United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7663

To be Argued by
MURRAY GARTNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7663

AJAX HARDWARE MANUFACTURING CORPORATION

Plaintiff-Appellant,

-v.-

INDUSTRIAL PLANTS CORPORATION

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S BRIEF

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Preliminary Statement

This appeal brings up for review a record of two jury trials before District Judge Richard H. Levet, in which a meritorious claim was eroded to nothing by successive erroneous rulings of the district court, despite a special verdict by the first jury finding defendant liable for negligence.

In this diversity action, the plaintiff-appellant, Ajax Hardware Manufacturing Corporation ("Ajax") sued defendant-appellee Industrial Plants Corporation ("Industrial") for breach of oral contract, negligence and fraud for its unprofessional and grossly erroneous appraisal of certain machinery and equipment. Ajax asked damages of

$161,895.75 suffered when it was required to make that payment on a loan guarantee it executed in reliance on defendant's appraisal. Machinery, appraised as having a "fair market value" of over $900,000, was sold for only $144,000 at auction, following default by the borrower. Ajax's claim was based on Industrial's failure to make a proper independent professional appraisal, since it supplied either the wrong type of appraisal values for Ajax's stated purpose, or had supplied grossly inaccurate and misleading appraisal values because of its failure to perform a true appraisal.

The first trial resulted in separate answers by the jury to five special verdict questions. The jury found Industrial (1) liable to Ajax for negligence, but (2) not for breach of contract* or (3) fraud, and (4) awarded Ajax $70,000 in compensatory damages, but (5) no punitive damages. The district court granted Industrial's motion for a new trial on all issues, setting aside the verdict as to both liability and damages on the ground that the jury's award was a compromise of liability and damages. (Ct. Ex. 2, E-272-273; A-995.)**

On July 10, 1975, three months before the second

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* The peculiar circumstances in which this determination was made are discussed below, pp. 18-21.

** "A" followed by page numbers refers to pages in Volumes I through VI of the Joint Appendix; references to Exhibits, contained in Volume VII of the Joint Appendix, are given as PX (Plaintiff's Exhibit), DX (Defendant's Exhibit), or Ct. Ex. (Court Exhibit) with exhibit number. "E" followed by page number refers to pages in the Exhibit Volume. "PTO" refers to the Pre-Trial Order.

trial was scheduled to begin, the district court proposed sua sponte a form of special verdict which eliminated from the case the separate negligence and fraud causes of action (A-140-142).* Then, at the start of the trial, the court permitted an amendment to the answer, to add an affirmative defense of "mitigation of damages", although plaintiff had established, in response to the motion to amend, that the evidence on which defendant relied for that purported defense was irrelevant.

At the second trial, essentially the same evidence was presented as in the first trial. Judge Levet, however, dismissed the negligence and fraud claims before submission of the case to the jury. He ruled that negligence was completely merged in the breach of contract claim, even though the evidence established that defendant was grossly negligent in the preparation of the appraisal report it delivered to plaintiff for a fee, whether or not there was any contract. The district court also ruled that there was insufficient evidence of fraud to go to the jury.

The case was given to the jury with a form of special verdict questions which were substantially the same as what the district judge had proposed in July, 1975**, over plaintiff's written and oral objections. The first special

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* In his opinion granting a new trial, the district judge gave his view that in the first trial plaintiff had had "too many strings to its bow" and seriously suggested that in the second trial plaintiff should voluntarily abandon its negligence claim, the only one of the three claims on which it had won the jury's verdict (A-110).

** See, however, p. 27, footnote, below.

verdict question inquired into the existence of a particular, precisely limited, contract whose terms did not reflect plaintiff's basic claim. The jury found that such a contract had not been made. It was given no opportunity by the district court's formulation of questions to find the existence of any other contract whose terms would be in accord with plaintiff's contentions.

Appellant contends that the jury's finding of liability for negligence in the first trial should not have been set aside. There should not have been a second trial on the question of liability, and, in any event, in such trial the issues of negligence and fraud should not have been taken from the jury, and plaintiff's contract claim should have been fairly presented to the jury. The judgment of dismissal below, therefore, should be reversed and the first jury's special verdict of liability should be reinstated; judgment for the amount of $161,895.75 which defendant conceded, only after the first trial, to be undisputed, plus interest, should then be entered in Ajax's favor.

Questions Presented

1. After the first trial, did the district court err in setting aside the jury's special verdict as to liability as well as its questionable special verdict as to damages, and ordering a new trial as to all issues, and in denying plaintiff's motion for judgment n.o.v. in the amount of $161,795.75, or a new trial limited to the issue of damages?

2. At the second trial, did the district court submit the case to the jury so as to preclude fair consideration of plaintiff's claims, in that:
   (a) Ajax's negligence claim was improperly dismissed as a separate claim on the ground that it was "merged" in the contract claim;
   (b) Ajax's fraud claim was improperly dismissed on the ground of insufficient evidence;
   (c) The special verdict form given to the jury excluded from consideration Ajax's basic contract claim;
   (d) The jury's consideration of the small remaining portion of Ajax's contract claim was tainted by prejudicial admission of irrelevant evidence, prejudicial statements by defendant's counsel, and prejudicial comments by the court?

Statement of Facts

On August 12, 1966, Ajax engaged Industrial, which represented itself to be expert in the appraisal, auction, and sale of industrial machinery and equipment, to appraise machinery owned by Time & Micro Instruments, Inc. ("Time") located in Strasburg, Pennsylvania. (PTO, A-27-28; A-601-603, 1082-1084). Ajax was at that time seeking to obtain a Government contract for the production of fuses, and was considering using Time as a subcontractor, or joint venturer, to produce timing mechanisms required for the fuses. Ajax advised Industrial that it was considering a loan of some $250,000 to Time to be secured by the machinery and equipment in Time's idle watch manufacturing plant (A-601-603, 1084, 1223-1224).

The oral contract for Industrial's appraisal services was made at a meeting in New York on August 12, 1966 between Howard Klein, Executive Vice President of Ajax and Jesse Thaler, Vice President of Industrial and its appraiser. Klein testified that he specifically told Thaler that Ajax was contemplating either advancing money or guaranteeing a loan for Time and that Ajax wanted Industrial to appraise the machinery so that Ajax could determine whether the machinery would have sufficient value as collateral to assure net proceeds, in the event of Time's default, of at least $250,000 (A-1084, 1223-1224, 601-603). For that purpose, he also told Mr. Thaler that Ajax wanted to know the replacement cost and forced sale value of the Time machinery (A-1084, 604).

Klein stated that he asked Thaler to appraise the machinery individually by item and to determine what each would be worth on a forced sale (A-1268, 605). Thaler confirmed in his testimony* that Klein told him that Ajax wanted the appraisal "in connection with some financing which would involve the machinery as collateral" (A-657, 1495).

Following his on-site view of the machinery on April 15, 1966, Thaler called Klein and reported that "the high side", or fair market value, appraisal was $900,000 and that the forced liquidation value of the machinery and equipment would be approximately $500,000 (A-1097-1098, 611). Klein asked Thaler to send a confirming telegram so that Ajax could have the information in writing before consummating the loan agreement with Time (A-1100, 611). Thaler sent such a telegram on August 17, 1966 (PTO, A-28; PX-3, E-59).

The telegram, addressed to Mr. Klein, stated that the "fair market value" of the machinery and equipment was $919,072. "In place value" was given as $137,806, with "total in place value of plant" as $1,056,878. The telegram commented on the "excellent condition" of the plant equipment, stated that the machinery "was mainly of Swiss manufacture" and "not available to American manufacturers unless they are members of the Trust", and that "manufacturers in this country would pay important premiums over and above

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* Portions of Mr. Thaler's pre-trial deposition were read to the jury.

the values as established" for this machinery. It summed up those comments by saying, "while it is difficult to project market values for the next two years it is inconceivable that the value of this plant would be less than 60 per cent of the appraised figure" (PX 3, E-59).

After receipt of the telegram appraisal, Ajax entered into a Loan & Security Agreement on August 18, 1966 with Time (A-1100-1102, 1340-1342, 614; PX 4, E-60-67). The agreement provided, among other things, that Ajax would lend to or obtain a loan for Time in the sum of $270,000, for a period of 120 days, and that such loan would be secured by a valid first lien on the machinery and equipment which had been appraised by Industrial (PX 4, E-60). Ajax had until September 9, 1966 either to fulfill its loan commitment, or to cancel the agreement and pay a penalty of $20,000 (PX 4, E-60, 66; A-1297-1298).

On August 19, 1966, Industrial mailed its formal appraisal report to Ajax, consisting of a list of machinery and individual values (PX 6, E-98-113) and a formal appraisal letter (PX 5, E-96-97) which expanded on the telegram and more precisely stated "the total 'Fair Market Value' of the entire contents of the plant ... is $919,085.00" (emphasis added) and "the total additional 'In Place Value' is $137,806.00, making a total 'In Place Value' for the facility of $1,056,891.00."

The letter clearly stated that the values given in the accompanying appraisal were values of the items as used

machinery, if they were made available to other manufacturers, not their value as a "plant", in the shorthand of the telegram. Thus, the formal appraisal letter stated:

> "In our opinion, manufacturers utilizing most modern high precision equipment of this nature would pay important premiums over and above the values as established in our appraisal if this equipment were made available to them.
>
> ***
>
> May we also make mention that there is a dearth of standard American made machine tools, and as a result, the market value is higher today than it has been in our experience of 50-years in this field.
>
> It is difficult to project the market values of used machinery for the next 2-years, however, it is inconceivable that the value would be less than 60% of the appraised figures that we have established."
>
> (PX 5, E-96-97, emphasis added).

The formal appraisal report, while confirming Thaler's telephone estimate of approximately $500,000* as the total forced-sale value, or lowest conceivable value, for all the Time machinery, was not in complete conformity with Klein's instructions, in that it did not provide the individual forced-sale values of each item of machinery (A-1113-1114, 1282-1283). Ajax's President, Norman Louis, therefore, wrote to Industrial the day after receipt of the formal appraisal thanking Thaler for providing the appraisal in time for Ajax to reach a "preliminary understanding"

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* By saying that it would be "inconceivable" that the used machinery would have a value "less than 60% of the appraised figures". 60% of $919,085 is just over $550,000.

with Time, and reminding Thaler that, "As Mr. Klein discussed with you, we would also like for our own information, what in your opinion the equipment would bring under a forced sale" (PX 7, E-114). He added that it was "urgent" that Ajax receive a reply by August 30* (PX 7, E-114).

On August 30, 1966, Industrial's Vice President, Mr. Sidney Kriser, sent Klein an air mail special delivery letter advising him that, to allay any doubts about the appraisal which Industrial had delivered, Ajax should have its bank communicate with certain bank officials "to verify the authenticity and realiability [sic] of our appraisal figures." Those bank officials, he wrote, are "well qualified to assure your bank that the appraisal figures that we have indicated in connection with Time & Micro (or any other appraisal that we will sign our name to) is a solid and scientific evaluation of the assets in question." (PX 10, E-118).**

The steps which Mr. Thaler had followed to arrive at his "solid and scientific evaluation" were unknown to Ajax at the time. Mr. Thaler's testimony, given at a pre-trial

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* Ajax, as noted above, could have renounced the Loan & Security Agreement before September 9, 1966, for a penalty of $20,000.

** At the second trial, Klein also testified that, in a conversation with Mr. Kriser on August 30, 1966, Mr. Kriser told him "not to be concerned . . . , that his firm had performed appraisals where the machinery and equipment would be used as collateral in the past," after Klein had expressed his concern to Kriser that "there was some ambiguity in some of the wording of the liquidated value portion . . . of the appraisal," (A-1124-1126, 1352-1353).

deposition and received in evidence at the trials, established that he had not made the most elementary inquiry to determine whether there was any market either for the plant as a plant or for the individual items of machinery. Plaintiff's expert on the watch industry, Mr. Arthur Sinkler, former president of the Hamilton Watch Company, testified at both trials that in 1966, the United States watch-manufacturing industry was dying and there was no market for the kind of watch-manufacturing machinery contained in the Time plant (See p. 16, below).

Relying, however, on Industrial's appraisal, Ajax entered into an agreement on September 1, 1966 to guarantee a loan from the First Western Bank & Trust Company (the "Bank") to Time in the sum of $270,000 for a period of 120 days, with the machinery appraised by Industrial as collateral (A-1127, 1353-1354; PX 11, E-119). On those terms, the Bank loaned Time $270,000 (PX 12, 13, E-120-126). The loan came due on January 9, 1967; Time defaulted; and Ajax therefore became obligated under its guarantee to pay to the Bank any indebtedness of Time which remained after application of the proceeds of the sale of the machinery and equipment which was collateral for the loan (A-1132; PX 11, E-119).

Time and the Bank retained Industrial in August, 1967 to conduct an auction sale of the Time machinery and equipment. The sale took place on October 10, 1967, following publicity and advertising for the sale (PTO, A-28; A-1132-

1134, PX 20, 21). The proceeds of the auction sale were barely $144,000 (A-28, 1134). On May 20, 1968, Ajax paid $163,270.70 to the Bank in discharge of its guarantee of Time's note, in full satisfaction of the unpaid balance and interest of Time's loan, and expenses incurred by the Bank in connection with the loan, after application of the proceeds of the auction sale (PX 27, E-132). Subsequent adjustments reduced the amount paid by Ajax to $161,895.75, the amount of compensatory damages it claimed in this action (PTO, A-20).

The Proceedings Below

A. Pre-Trial Proceedings

This diversity action between a California and a New York corporation was begun on May 5, 1969 (A-6-13). Following discovery, and pre-trial conferences before Judge Pierce and Magistrate Raby, a pre-trial order stating the parties' contentions with respect to liability and damages, framing the issues for trial, and stipulating to certain facts, was entered on January 11, 1974 (A-16-29). On February 8, 1974, the action was reassigned to Senior Judge Richard Levet (A-2).

B. The First Trial, April 23 - May 1, 1975

The first trial began on April 23, 1975. Ajax read to the jury from the pre-trial depositions of Howard Klein, of Ajax, and Jesse Thaler, of Industrial, and called as expert witnesses, Mr. George Sinclair and Mr. Arthur Sinkler. Mr. Sinclair, the International President of the American Society of Appraisers, testified on the ordinary and usual practices

and standards of professional appraisers; Mr. Sinkler, former president of the Hamilton Watch Company, testified about the uses of, and market for, watch-manufacturing machinery in 1966. Ajax also read to the jury from the deposition of Mr. Martin Kaefer, a Vice President of the Hirschmann Company, who, at Time's request, had reported certain values* for the machinery in the Time plant in 1964, on which Industrial claimed to have relied. Industrial called as its only witness, Mr. Sidney Kriser, then Industrial's president, and read some portions of Mr. Thaler's deposition.

The uncontroverted testimony showed that Industrial grossly failed to adhere to proper professional standards in performing the appraisal, which it had delivered to Ajax for a fee of $4,422.71, and that it had made false representations as to the demand for the Time machinery, without any reasonable basis to believe the statements were true. Not only was the evidence as to the manner in which Industrial performed the appraisal uncontested, but it was the testimony of Industrial's appraiser, Mr. Thaler.

Thus, Thaler's testimony showed that he spent only one day in examining more than 600 machines (A-666-668; PX 6, E-98), that he did not turn any of the machines on (A-663),

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* Although during the trials Mr. Kaefer's product was sometimes referred to as the Hirschmann appraisal, Mr. Kaefer was not a professional appraiser and testified that he had never made an appraisal before he reported on the Time machinery (A-876-877).

did not uncrate many of them (A-670-672), did not make any inquiry as to the market demand for those machines (A-723-724, 706-708, 668-669, 702-703, 719) or their original cost or the cost of replacing them (A-698-701), or any other inquiry or research concerning their value (A-667-669, 672-673). Thaler's testimony was that he had copied, and in many cases simply increased, the values for each machine given on the two year old Hirschmann "appraisal" report (A-703-704, 660-662, 666-668, 698-700, 715, 722-723) and that, as to some individual machines, Thaler accepted without question, valuation figures and information given by an employee of Ajax (A-678-680, 696-697). The appraisal, nevertheless, was submitted to Ajax as an independent professional judgment, and reported great demand for the machines, without specifying that it was in fact in large part based only on the Hirschmann "appraisal", which had been given to Thaler merely as an inventory list, with the specific admonition that Ajax wanted his independent professional judgment "regardless of what the Hirschmann appraisal said the equipment was worth" (A-652-653, 678-680; PX 5A, E-98-113; PX 29, E-96-97).

Industrial did not dispute Ajax's expert testimony that an appraiser's first obligation is to determine the purpose of the appraisal and to supply a type of value appropriate for that purpose (A-497-498, 573; PX 7, ¶3.1, E-137). As Mr. Sinclair testified, an appraisal for the purposes of determining whether machinery is adequate collateral for a

loan "would be primarily concerned with the liquidation value of that machine for off-site sale under forced conditions" (A-502-503, 523-524), not with the fair market value in place. Sinclair also testified, and the "Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers"* specify, that an appraiser should explain and describe the appraisal value supplied, report any contingent or limiting conditions, and report any individuals or sources which he has relied on (A-511-514, 519-520; PX 7, ¶¶ 6.1, 8.2, 8.3, E-141-142, 150-151).

In making an appraisal of machinery, moreover, the appraiser must determine the economic conditions in the industry and the market which exists for the machinery (A-499-502, 529-531). Sinclair expressly testified that it was not consistent with the standards of professional appraisal practice in 1966 to render an appraisal of machinery without checking the marketability of the machines (A-529-530), without making any inquiry into economic conditions in the applicable industry (A-531), or to receive and use information from an employee of the client and from a former appraisal report without stating so in the appraisal (A-531-532). There was no dispute that Industrial had not complied with professional standards, by doing just those things (A-514-516, 524).

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* Mr. Thaler was a Senior Member of the Society (A-646).

Mr. Sinkler testified that, because of the moribund state of the precision watch-making industry in the United States in 1966 and the expected decrease in tariffs on imported precision watches (A-404-405, 481-482), the most cursory inquiry would have informed Industrial that there was "no market" for a factory such as the Time plant, with its collection of highly specialized machinery, in-place, or otherwise (A-417, 476-477); this testimony was confirmed by Mr. Kaefer (A-874-875, 888-889). Moreover, Mr. Sinkler testified that Industrial's statements in its appraisal report that the machinery was "not available to American manufacturers unless they are members of the trust, and even then the delivery of this type of machinery ranges between 2 and 3 years", that "manufacturers utilizing most modern high precision equipment of this nature would pay important premiums over and above the values as established in our appraisal if this equipment were made available to them," and that "To our knowledge there is not one existing plant in this country so equipped", were all false (A-408-414, 416-419, 424-426; PX 6, E-175-186; PX 29, E-96-97). Thaler's deposition testimony, read to the jury, established that he had no present knowledge of the truth or falsity of those statements and that he made no inquiry to verify them (A-675-680).

The evidence, therefore, conclusively established that whatever the oral agreement between Thaler and Klein had been, the actual appraisal report which Industrial de-

livered to Ajax with the knowledge that Ajax would rely on it (A-691) was prepared not only negligently, but cavalierly, with a total absence of any effort to ascertain or verify any of the values given, whether they were "fair market values", in-place value, or lowest conceivable value.

As to Ajax's damages from the negligent appraisal, documents admitted in evidence by stipulation, made on the next to last day of the trial, showed Ajax's guarantee of the Bank loan to Time and Ajax's payment to the Bank of $163,270.70* (PX 22, E-132) in discharge of its guarantee obligation. The district court, however, refused to charge the jury that if it found liability on any of the three claims stated by the plaintiff, it must award the full amount of the damages claimed. On the contrary, the jury was charged that $161,895.75 was the limit of the compensatory damages it could award (A-971). That charge, moreover, came after the court had permitted defendant, in summation, to suggest to the jury that, in determining the amount of any damages, it should take into account, as a deduction, any amount which Ajax might have

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* Ajax was later credited with $1,374.95 by the Bank, thus reducing its loss to $161,895.75. Plaintiff was unable to put evidence of that refund before the jury, because at the beginning of the trial, the district judge had refused a brief adjournment because of the sudden illness of Ajax's president, who would have been able to explain the payment of $163,270.70 and reconcile it with the claim of $161,895.75. Plaintiff, however, stipulated that it was seeking only $161,895.75, and the district court charged the jury that its damage award "cannot exceed" that amount, without explaining the discrepancy with the documentary proof of payment of $163,270.70 (A-971).

received from the United States or from Time, although there was no proof that any such amount had been received (A-927, 929-931).

When the district court submitted the five special verdict questions to the jury (Ct. Ex. 2, E-272-273), they were instructed specifically, in writing, not to proceed to the questions concerning compensatory and punitive damages (Questions 4 and 5, respectively), unless and until they answered "Yes" to at least one of the first three questions on Industrial's liability for breach of contract (No. 1), negligence (No. 2), or fraud (No. 3) (Ct.Ex. 2, E-273; A-961-962, 969, 986).

After deliberating approximately four hours, the jury sent a note on the morning of May 1 to the district judge (Ct.Ex.4, E-275). Without reading the note to counsel, Judge Levet told them:

> "I received a note to the effect that 'we do not have a unanimous vote' but I am going to call them in and tell them to go back and deliberate further. This is no time to stop."
>
> (A-992)

Both counsel, of course, assumed that the district judge had accurately summarized the contents of the note. It was only much later*, months after the district court had set aside the jury's special verdict on liability, as well as

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* To our knowledge, until the conclusion of the second trial, Judge Levet had kept the file and all Court exhibits in his chambers (A-262).

that on damages, that we learned that the note from the jury in fact reported that the jurors had agreed unanimously on liability for either negligence or fraud, and on damages, but were not able to reach agreement on the question of breach of contract. The note read:

"YOUR HONOR:

WE DO NOT HAVE
A UNANAMOUS AGREEMENT
ON QUESTION #1.
WE HAVE AGREED 100%
ON QUESTIONS #2, 3, 4, AND 5.
PLEASE ADVISE.

BENJAMIN J. NATHAN
FOREMAN"

(Ct. Ex. 4, E-275; emphasis in original)

Without informing counsel of the true contents of the note, which informed the court that the jury had found unanimously in Ajax's favor on at least one theory of liability, and had determined the amount of damages, Judge Levet called in the jury and thus addressed them:

"THE COURT: Now, Mr. Foreman and members of the jury, I have your note, the gist of which is that you have not agreed.

"I shall have to ask you to go back and deliberate some more. This is not a simple case. It is a complex case. I believe that if you review it, if you discuss the facts, if you reconsider it, you will be able to come to a unanimous vote. Obviously, there may be, at times, a

divergence. However, it has been said that if there is a majority one way, then the minority should well consider whether or not they should recast their decision after due deliberation and consider, at least, the reasoning of the others.

"However, I do not mean to say that you should be doing anything which is contrary to your conscience and contrary to your judgment but I do feel that in this sort of a case, which is somewhat complex, of course, that you should be asked to redeliberate.

"It costs money on both sides to try such a case as this. It is important to the plaintiff; it is important to the defendant; it is important to the Court. We have spent quite a bit of time on this case and I don't like to see this go down the drain, I don't like to see what is called a mistrial and I therefore request you now to go back and reconsider." (A-992-993; emphasis added).

Less than fifteen minutes after this puzzling statement, suggesting a mistrial when the jury had unanimously found in plaintiff's favor, the jury returned with the completed special verdict form which now was unanimous on Question

1,* as well as on all the other questions on which the jury had previously reported unanimity (A-994-995; see p. 2, above).

C. Separate Verdicts as to Liability and Damages Both Set Aside and New Trial Ordered.

Industrial moved to set aside the jury's verdicts and for judgment n.o.v., or for a new trial on all issues on several grounds, including principally the claim that the verdicts represented a compromise among the jurors and that the verdicts on breach of contract and negligence were incompatible (A-75-77).

To support its inference of a compromise, Industrial, in its moving papers, stated for the first time that, on a finding by the jury that the defendant was liable on any one of the three causes of action, $161,895.75 was "the undisputed amount to which plaintiff would be entitled," (A-86), and that "the liquidated damages in this case were $161,895.75" (A-85). In contrast to its post-verdicts position that the amount of compensatory damages was fixed, Industrial had suggested to

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* Shortly after they began deliberations on May 1, 1976, the jury asked for further instructions on the meaning of breach of contract (See p. 34, below). Judge Levet's reluctant instruction that there was a "certain overlapping" between negligence and breach of contract may very well have been the reason why the jury could not reach agreement on Question 1 (A-991-992). Nevertheless, when they were sent back to deliberate on that question, apparently, the minority (see p. 20, above) in favor of the plaintiff acceded to Judge Levet's admonition and joined the majority in answering "No" to that question, leaving their unanimous agreement on the other questions undisturbed.

the jury in its summation, without demur by the court, that the amount of damages might be reduced by either of two speculative amounts, i.e., any amount which Ajax might have recovered in a suit against Time, or any amount which Ajax might have received from the United States Government as a settlement on a contract to manufacture fuses (A-97, 926-927, 929-931).

Ajax moved to set aside the verdict as to damages only, and for judgment n.o.v. for $161,895.75, or a new trial limited to the issue of damages (A-93-94). That motion was premised on three grounds: (1) Industrial's post-trial position that damages were undisputed and fixed at $161,895.75; (2) the evidence itself which supported no other conclusion; and (3) the way in which the jury was instructed as to the determination of the amount of the damages.

The district court had specifically refused to instruct the jury, as plaintiff requested, that, in the event the jury found liability, "the damages should be in the amount claimed,"* but instructed them that they could not award compensatory damages in excess of $161,895.75 (A-971). On May

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* The record does not contain plaintiff's request for such a charge, but contains statements of Ajax's counsel and the court in the post-verdicts colloquy which show that the request was in fact made, and denied (A-998). It should also be pointed out that the district court repeatedly denied plaintiff's request for an additional half-hour for summation, and thus prevented adequate presentation to the jury of plaintiff's summation on fraud, amount of compensatory damages, and punitive damages (A-98, 925).

28, 1975, however, Judge Levet ordered the special verdicts as to liability and damages both to be set aside, and ordered a new trial of all issues, on the ground that the verdicts represented a compromise (A-108-114). Judge Levet found that "defendant has essentially stipulated this sum [$161,895.75] as representing the amount of damages, if any, sustained by plaintiff" (A-111), and found that "the jury's award of $70,000 is substantially below the essentially undisputed liquidated damages of $161,895.75 in this case and is therefore clearly inadequate." (A-112). The district court went on to find that "In a case such as this, where the issue of liability is strenuously contested and an obviously unjust and inadequate verdict as to damages is rendered by the jury, such a verdict gives rise to the inherent inference that it is the product of a compromise" (A-112), and therefore ordered a new trial as to all issues.

Ajax moved on June 5 to amend the order to provide the necessary certification to permit an interlocutory appeal under 28 U.S.C. §1292(b), since the district court's opinion ignored, without discussion, numerous cases cited in Ajax's memoranda on the post-trial motions, holding that an inference of a compromise verdict as to liability can not be drawn merely from an inadequate award of damages (A-115-129). Ajax, at that time, was unaware that the jury had reached unanimous agreement on liability during four hours of deliberation, and not in the few minutes after they had been sent back for fur-

ther deliberation after they had informed the district judge of their unanimity on at least one of the three claims. The district court denied Ajax's motion on June 11, 1975 (A-129-131).

D. Second Trial, October 14-23, 1975

Having scheduled a new trial, the district judge next proposed to eliminate or minimize the one issue on which plaintiff had overwhelmingly demonstrated defendant's liability, and won a prior verdict. He submitted to the parties a different form of special verdict questions which left out of the case negligence as an independent cause of action. Nor did it contemplate any submission to the jury of fraud or punitive damages. And it posed as the keystone question, without a "Yes" answer to which plaintiff's entire case would be at an end, the question whether the parties had made a contract in particular terms which reflected only one extremely limited version of plaintiff's contract claim (A-140-142).

Plaintiff objected (A-149-160) to the form of special verdict questions submitted, because the evidence presented at the first trial and defendant's post-trial sworn concession* that the amount of damages was "undisputed" and "liquidated" made the questions inappropriate to the case; those questions

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* That concession obviously was made in order to get a new trial; yet the court which had relied on it in order to justify its order for a new trial now proposed to give the second jury the same latitude in determining damages as it had been given in the first trial, and, in fact, did (A-879-882, 890-892; compare Ct. Ex. 3, E-249 with Ct. Ex. 5, E-252).

would, in fact, ensure plaintiff's defeat. The court reserved decision, but after the evidence was in at the second trial promulgated the special verdict questions in even more limited form than in July (Ct. Ex. 5, E-250-252).

Just a few days before the scheduled start of the second trial, the district judge granted an informal motion to reopen discovery on defendant's attorney's stated "belief" that monies which Ajax had received from the United States Government in the termination of its fuse contract was in large part reimbursement for Ajax's loss on its guarantee of Time's loan (A-1030-1032). Ajax's attorney was forced to go to California, practically on the eve of the second trial, to locate and review files seven or eight years old to refute defendant's unsupported assertions.

In response to the defendant's demand for production of documents (based on its unsupported "belief"), for which the district court had shortened the time for response, plaintiff, after great effort and expense, filed documentary evidence that conclusively showed that Ajax had not included its guarantee loss among its termination claims (A-178-183, 188-226). The district court, nevertheless, at the opening of the second trial on October 14, 1975 (A-1045-1046) granted defendant's motion to amend its answer to include "mitigation of damages" as a new affirmative defense.

During the trial, under that defense, and over plaintiff's strenuous objection, the court accepted in evi-

dence documents showing that Ajax had received some $249,000 from the Governoent, although there was absolutely no proof and no attempt tc prove that any of that amount had been paid to recompense Ajax for its guarantee loss (DX B, G, I, E-189-205). Throughout the trial, and in its summation to the jury, defendant insisted that the entire amount received from the Government should be applied to negate any loss which Ajax might have suffered on the loan guarantee, although it had submitted an affidavit after the first trial saying that damages were "undisputed" and "liquidated" in the amount of $161,895.75 (A-1076-1077, 1892-1893).

The evidence at the second trial concerning the terms of the appraisal agreement, the performance of the appraisal, the communications between Ajax and Industrial, and Industrial's negligence and misrepresentations in the appraisal was substantially the same as at the first trial. Mr. Klein testified in person on behalf of Ajax in place of his deposition read to the jury at the first trial. Mr. Sinkler and Mr. Sinclair testified again as expert witnesses concerning the appropriate appraisal procedures Industrial should have followed, the state of the watch manufacturing industry, and the very different results which would have been obtained had a proper appraisal been performed.

After the close of Ajax's case, Industrial moved for a directed verdict on all three issues, on the ground of insufficiency of the evidence (A-1707). The court denied the

motion with respect to breach of contract, but upon the court's theory, advanced sua sponte, that the question of negligence "is completely merged in the alleged breach of contract" (A-1755), dismissed the negligence claim. The fraud claim was dismissed upon a determination that Ajax had not proved the requisite elements of fraud by clear and convincing evidence (A-1755-1756). The court also dismissed Ajax's claim for punitive damages (A-1832-1833), because with negligence and fraud out of the case by the court's determination, no claim on which to found punitive damages remained.

The jury was given a series of special verdict questions to answer concerning the remaining claim for breach of contract and damages in substantially the form submitted by the court in July, 1975, three months before the trial.* It was instructed in writing that it could not find in Ajax's favor, or consider any further questions, if it answered "No" to the first question, which was:

> 1. Has plaintiff (Ajax) proved by a fair preponderance of the credible evidence that on or about August 12, 1966 defendant (Industrial) entered into a contract to appraise the dollar amount which in defendant's opinion could be realized from the sale of individual items of machinery and equipment at the Time & Micro plant at a forced or liquidation sale?
>
> _____ Yes _____ No

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* Without explanation, however, the court had removed a question which would have permitted the jury to find that the contract as described by the court, if found to have been made, was breached by negligence. Thus, the court removed the possibility that the jury might find negligence in any way.

> If your answer to question 1 is "Yes", proceed to question 2.
>
> If your answer to question 1 is "No", omit all further questions and sign the Special Verdict on the last page.
>
> (Ct. Ex. 5, E-250)

This question was submitted by the court over Ajax's objection that it was a travesty on Ajax's true contract claim,* and represented only one possible and very exclusory agreement to provide an appraisal to determine whether the Time machinery was sufficient collateral for a loan of $250,000. In other words, plaintiff argued that, from the evidence, the jury could have found that Industrial had agreed to render an appraisal so that Ajax could determine whether the Time machinery had adequate value as collateral for a $250,000 loan, but since such an agreement would not contain the precise terms included in the court's postulated agreement, the jury

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* The complaint alleged that defendant agreed to make an appraisal "having in mind the particular purpose for which plaintiff sought said appraisal" and stated that purpose as to determine whether to make a $270,000 loan to Time (A-8, A-7). Similarly, the pre-trial order gave it as one of plaintiff's contentions that it "engaged the defendant ... to make a true and accurate appraisal of the machinery and equipment owned by . . . [Time], with which plaintiff was considering entering into a loan agreement, if the machinery and equipment would be adequate security for the contemplated loan." (A-16-17). If such specific pleading and a specific pre-trial order contention based thereon, supported by substantial evidence, may be reduced after trial to the narrowest of claims, the well-established liberality of federal pleading would be nothing but an extremely expensive and wasteful delusion.

would be forced to answer "No" to the precise question it was asked. Moreover, the court's sine qua nihil question prevented the jury from finding even that Industrial had agreed to deliver the appraisal which it did deliver and that it was grossly negligent in the preparation of that appraisal, thus breaching that contract.

Two trials and fifteen court days after and despite a pre-trial order which stated plaintiff's contract claim much more broadly, the second jury answered "No" to the medieval question the court chose to propound. Since it was forbidden by the district court to consider anything else, the second jury returned a verdict against the plaintiff, and the court entered a judgment dismissing the complaint on October 24, 1975 (A-249).

ARGUMENT

I

The District Court Erroneously Set Aside the First Jury's Special Verdict as to Liability.

In reviewing the order setting aside the jury's special verdict on liability in the first trial, it must be remembered, as the Court of Appeals for the Fourth Circuit recently said, that

> "There is always a presumption in favor of the validity of a verdict if it is the result of honest judgment."*

There is no reason here to doubt that the jury used its honest judgment in finding liability nor is there any basis for an inference that the jurors compromised on that question. The record "viewed in its entirety" does not "clearly demonstrate the compromise character of the verdict", Maher v. Isthmian Steamship Company, 253 F.2d 414, 419 (2d Cir. 1958); on the contrary, the record establishes that, in complete accord with the district court's written instructions, the jury unanimously found defendant to be liable by its special verdict before it even considered the amount of the damages.

The district court's order setting aside the jury's special verdict on liability and granting a new trial as to all issues, and its refusal to certify the propriety of its order

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* Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839, 846 (4th Cir. 1975).

as a question for an interlocutory appeal (A-129-131), did Ajax a "grave injustice". Yates v. Dann, 11 F.R.D. 386, 394 (D. Del. 1951). Ajax cannot recoup the lost time and expense of the second trial and attendant motions, but this Court can* and should restore the verdict which was wrongfully taken from Ajax, and direct entry of judgment in the amount which defendant conceded, after the first trial, was "undisputed" and "liquidated".

There is simply no support for the district court's conclusion that the jury's inadequate award of damages resulted from a compromise as to liability. The record shows that the jury found damages, as it believed, in accordance with the instructions of the court, which, in its charge, left the impression that the jury could award less than the only proven amount, after defendant had suggested in summation that the jury deduct putative receipts. Since the jury was told by the district judge that its award "cannot exceed" $161,895.75, obviously it believed it could award less. No inference can be drawn from its award of $70,000 that any juror had compromised his conviction that there was no liability in exchange for another juror's agreement to award only a reduced amount of damages.

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* The district court's order granting a new trial is properly reviewable on appeal from judgment following a second trial, and on reversal of the order the Court of Appeals may reinstate the first jury's verdict. Reinertsen v. George W. Rogers Construction Corp., 519 F.2d 531 (2d Cir. 1975); Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969); Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971).

Industrial indeed urged, almost from the moment that the jury's complete answers to the special questions became known, that just such a compromise had occurred. It was able to make that argument only because it appeared at that time that the jury had been deadlocked when they sent their note (Ct. Ex. 4, E-275) to the court, and that within minutes after being sent back by the court, they returned unanimous verdicts on all five questions.

We can only express astonishment now that the district judge, who led both counsel to believe that the jury was unable to reach agreement on any question, when he misreported the contents of its note, did nothing to correct that impression when defendant's counsel, minutes later, urged that the jury's quick agreement was conclusive evidence of compromise on all questions* (A-997). The district judge allowed the competing motions as to the verdicts to be briefed and argued on the grossly mistaken assumption, derived from his summary of the jury's note, that agreement was reached a few minutes after the jury had reported complete inability to agree, and then set aside the verdicts on the ground that the jury had improperly compromised on liability.

We now know that the jury actually reported its unanimous agreement on Industrial's liability and on the amount of damages to be awarded, and reported disagreement only on the

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* Cf., to the contrary, Maher v. Isthmian Steamship Company, 253 F.2d 414, 419 (2d Cir. 1958), where the jury had, in fact, reported themselves deadlocked and then reached a verdict after further deliberation.

breach of contract question. There is therefore absolutely no reason to assume that the jury did not meticulously observe the court's written instructions not to proceed to Questions 4 and 5 until it had unanimously answered "Yes" to one of the first three questions. If it compromised liability and damages before it reported unanimous agreement on Questions 2-5, why did it so scrupulously report to the court that it could not agree on Question 1?

Nothing in the cases relied on by the district court in setting aside both special verdicts as a compromise on the question of liability applies to what happened in this case. What the juries there did and the conclusions to be drawn therefrom are plainly different from this case, where the jury separately and properly determined liability first, but made an easily understandable mistake in its award of damages.

A. The Jury's Note to the Judge, and the Sequence of Events, Shows there was No Compromise Verdict.

The sequence of the jury's deliberations, especially as revealed in the note to the district judge (Ct. Ex. 4, E-275), proves conclusively that there was no improper compromise of liability and damages.

The jury was plainly instructed in both the charge and the written special verdict form itself to consider liability first, and to consider damages only if it had first found Industrial liable to Ajax on any one or more of the three theories of liability. (A-969, Ct. Ex. 2, E-273). On

April 30, 1975, the jury was out for only half an hour, when it was allowed to go home by the court (A-103). It returned the next day and resumed deliberations at 10:00 a.m. Approximately 15 minutes later, the jury asked the court "for an explanation from you as to what constitutes a breach of contract" (Ct. Ex. 3, E-274), the first question on the special verdict form which they were considering.*

At approximately 3 p.m. on May 1, 1975, the jury reported to the court, as we learned only long afterwards, that it had reached unanimous agreement on Questions 2, 3, 4 and 5, thus unmistakably telling the court that it had found liability for either negligence or fraud, and gone on to determine the amount of damages, but that it was unable to reach agreement on Question No. 1, breach of contract.** The proof

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* In response to that question, the court first charged the jury merely that a breach of contract was a failure to perform a contract as agreed. Ajax requested that the court reinstruct the jury, in accordance with its original instruction, that negligence in the performance of a contract was also a breach of contract. Industrial strenuously objected to any additional instruction, and the court at first refused to enlighten the jury further. Then, reluctantly, the court called the jury back and instructed them, cryptically, that "there is a certain degree of merging or overlapping" between breach of contract and negligence (A-988-992).

** The jury's failure to agree on the breach of contract question did not prevent the court from accepting the complete and unanimous agreement which the jury had reached on liability for negligence, and on damages. If the findings which a jury has reached conclusively dispose of a case, it is immaterial that it failed to make other findings. See, e.g., Kissell v. Westinghouse Electric Corp., 367 F.2d 375 (1st Cir. 1966);

Footnote continued/

that the jury's findings were not a compromise as to issues of both liability and damages lies in the jury note itself.

It seems self-evident that if the jury had truly reached a compromise verdict on issues of liability and damages at the time they determined Industrial was liable for negligence, they would not have reported a continuing disagreement on the issue of Industrial's liability for breach of contract. If they actually had compromised improperly in finding Industrial liable for negligence, why would they seek to continue deliberations as to breach of contract, and why would they report, voluntarily, that unanimous agreement had been reached on Questions 2, 3, 4 and 5 of the special verdict form, but that, in the face of the putative compromise, they could not reach unanimous agreement on Question 1?

In contrast to the true pattern which is shown by the jury's note, Industrial argued in support of its motion to set aside the verdict as a compromise, that the jury's agreement on a verdict just minutes after it had reported a "hopeless deadlock on the issue of liability" (Defendant's

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Footnote continued/

Sky[illegible] Aviation Corp. v. Minneapolis, N.&S. Ry. Co., 326 F.2d 701 (8th Cir. 1964); Gulf Refining Co. v. Fetschan, 130 F.2d 129 (6th Cir. 1942), cert. denied, 318 U.S. 764 (1943); Black v. Riker-Maxson Corp., 401 F. Supp. 693 (S.D.N.Y. 1975); Pacific Indemnity Co. v. McDermott Bros. Co., 336 F. Supp. 963) (M.D. Pa. 1971), aff'd sub nom. McDermott Bros. Co. v. Hauck Manufacturing Co., 475 F.2d 1395 (3d Cir. 1973).

Memorandum in Suppport of Motion under Rules 50 and 59, R-32, p. 19), showed that the verdict was a quick compromise of the controversy at the expense of both litigants. We know only now that this picture was completely contrary to the actual events.*

B. The Amount of Damages was not Undisputed at Trial.

Although Industrial conceded after the verdicts that the amount of damages was fixed and undisputed at $161,895.75 (A-85-86), and that the jury had no discretion to award a

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* Without any contradiction by the district court, Industrial repeatedly stated its view that a compromise on all issues was reached in the minutes between the judge's direction to continue deliberations following the receipt of Ct. Ex. 4, and the return of the completed special verdict form. (A-997, 124-125, 86, 90) As Industrial argued:

> "When note is taken of the fact that the jury finally reported itself as unable to reach an unanimous verdict and returned to the courtroom with coats on and hats in hand; when note is taken of the fact that this Court directed the jury to return to its deliberations and suggested that the minority group reconsider its views; when note is taken of the fact that some five minutes later the jury, until then evidently in hopeless deadlock on the issue of liability, suddenly reported that it had reached an unanimous verdict; and when note is taken of the fact that the jury's verdict as reported to the Court was in the arbitrary round figure of $70,000., being less than 50% of the liquidated damages which the plaintiff sought to recover -- noting all these circumstances, we say that the verdict did not represent a fair, logical and comprehensible reflection of the plaintiff's liquidated damages but, to return to the words of Judge Soper in Schuerholz v. Roach, supra, 'merely a difference of opinion among the jurors as to the defendant's liability and a compromise of the controversy at the expense of both litigants.' [emphasis supplied]" (Defendant's Memorandum, R-32, p. 19; emphasis added).

lesser amount, that was not Industrial's position during the trial.* Industrial refused to stipulate that damages were fixed, or even that Ajax had paid the balance of the Time loan to the Bank under the guarantee. Eventually, Industrial stipulated that documents showing Ajax's payment to the Bank could be received in evidence (A-97, A-681-682, 686-690).

Nonetheless, in its summation, Industrial strongly suggested to the jury not only that Ajax may not have "really lost that $170,000"** (A-930), but that any amount of damages could be reduced by either of two speculative amounts, i.e., any amount which Ajax might have recovered in a suit against Time, or any amount which plaintiff might have recovered from the Government as a settlement on a contract to manufacture fuses (A-297, 929-931).

The district court did not specifically instruct the jury not to reduce damages for any of the reasons suggested in defendant's summation, but several hours after defendant's

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* It was Industrial's refusal to stipulate to the damages which made Norman Louis' testimony essential, and which forced Ajax to apply to the district court and then to this Court for a writ of mandamus (Docket No. 75-3021) for an adjournment at the beginning of the first trial (A-58-59). Industrial later stipulated to the admission of essential documents, which made it possible to submit those basic facts to the jury, but without the detail and explanation which Mr. Louis could have given.

** It is truly incomprehensible how, in the face of that summation, defendant and the district court could have maintained that the amount of damages was undisputed at $161,895.75 during the trial, in order to support the setting aside of the special verdict on liability.

summation, said only that,

> "The fact that plaintiff may or may not have gotten some sort of settlement from the Government with regard to any fuse contract is not an issue in this case, and it is immaterial." (A-984-985).

The court did not even refer to defendant's comments about possible reduction of the damages award by a speculative amount which Ajax might have recovered by suit against Time.

C. The District Court Refused to Rule that the Amount of Damages, if any, was Fixed, and Gave the Jury the Impression it had Discretion as to the Amount of Damages.

The district court refused Ajax's request during the trial to instruct the jury that, in the event it found liability the damages should be in the claimed amount.* Instead, the court simply charged the jury that:

> "If you should find that the plaintiff is entitled to compensatory damages, your award cannot exceed the total sum claimed for such damages, which is $161,895.75." (A-971, emphasis added)

The clear impression given by the charge was that the jury had discretion to award any amount, as long as it was not more than $161,895.75. This impression was strongly reinforced by the special verdict form which asked the jury, in Question 4,

> "To what award is plaintiff entitled, if any, for compensatory damages."

and contained a blank line for the jury to fill with a number

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* See p. 22, footnote, above.

(Ct. Ex. 2, E-273).*

In fact, on May 1 when the jury returned with an award to Ajax of $70,000, the district court's actions and statements belied any later determination that the damage award was inconsistent with the court's directions as even the court understood them. The court remarked that "they were told a limit", and asked "what's wrong" with the jury's thinking that Ajax was damaged only to the extent of $70,000 (A-997-999).

When Industrial's counsel asserted, for the first time, that "the damages in this case were either $160,000, some odd thousand dollars, or they were zero," the court remarked skeptically, "I don't know" (A-997). If the district judge "did not know" at that point, it is preposterous to fault the jury for, and to infer any improper compromise from, their failure to know that damages were either zero or $161,895.75. Moreover, the judge expressed his own uncertainty, immediately after the jury returned its verdict, as to whether the damages were liquidated or unliquidated, finally concluding that they were "probably unliquidated" (A-1003).

Additionally, the district judge rejected the suggestion made by plaintiff several times that he return the jury with proper instructions as to damages (A-999-1000, 1006).

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* The questions in the special verdict form were approved on April 29, before the summations and in the absence of any concession by Industrial, at that time, that there was no dispute about damages.

If the court believed that the jury had not properly followed its instructions, it was clearly within the court's power to return the jury for further deliberations under proper instructions. See, e.g. University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518 (5th Cir. 1974). The fact is that the jury found damages as best they could, under the instructions of the court, and that finding does not taint their unanimous prior finding of liability.

D. The Decision to Set Aside the Verdicts is Not Supported by Judicial Authority.

The district court's decision, in finding the jury's verdicts to be an improper compromise, relied on just four cases. In two of them the courts found no compromise on liability. Freight Terminals, Inc. v. Ryder System, Inc., 461 F.2d 1046 (5th Cir. 1972); De Luca v. Wells, 58 Misc. 2d 878, 297 N.Y.S.2d 35 (Sup. Ct. Rensselaer Co. 1968).* The other two cases cited by the court, Schuerholz v. Roach, 58 F.2d 32 (4th

* In the De Luca case, the court ordered a new trial on damages alone, saying,

> "This record does not indicate a compromise between liability and damage but on the contrary shows the liability decision had support in the evidence. Defendant's contention that if dispute is sharp as to the liability, there must be a compromise is not well taken. Trial after trial juries decide sharply disputed questions presented on conflicting and contradictory evidence for such is their function. One can only say they fail to perform properly when the findings are against the weight of the evidence and it is only then that the stigma of compromise should be attached to their work." (297 N.Y.S.2d, at 39)

Cir. 1932), and National Fire Insurance Co. of Hartford v. Great Lakes Warehouse Corp. 261 F.2d 35 (7th Cir. 1958) are plainly different from this case, in that the inference of a compromise in those cases was clearly and necessarily drawn from facts appearing on the face of the record.

The facts in this case show only an inadequate damage award, which is not sufficient to support an inference of compromise, but calls, at most, for a new trial on damages. See, e.g., Devine v. Patteson, 242 F.2d 828, 832-833 (6th Cir. 1957), cert. denied, 355 U.S. 821 (1957); Young v. International Paper Co., 322 F.2d 820 (4th Cir. 1963); Darbrow v. McDade, 255 F.2d 610 (3d Cir. 1958); Gardner v. Vogel, 237 F. Supp. 119 (E.D.Pa. 1964); Yates v. Dann, 11 F.R.D. 386 (D. Del. 1951); Martin v. Payton, 20 F.R.D. 200 (W.D. Ky. 1957); 6A Moore's Federal Practice ¶ 59.06, p. 59-81; cf. Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 443 F.2d 76 (2d Cir. 1971); Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 471 F.2d 705 (2d Cir. 1972), cert. denied, 411 U.S. 933 (1973); Mertens v Flying Tiger Line, Inc., 341 F.2d 851, 857-858 (2d Cir.), cert. denied, 382 U.S. 816 (1965); Parker v. Wideman, 380 F.2d 433, 437 (5th Cir. 1967).

In Schuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932), the jury awarded plaintiff just $625 in damages for loss of an eye. The court said that this amount was so "grossly unjust and inadequate" that it "must have been so regarded by the very jurors who rendered the verdict and it can give rise only

to the inference that it did not represent a fair estimate of the plaintiff's loss, but merely a difference of opinion among the jurors as to defendant's liability . . . " 58 F.2d, at 34 (emphasis added).

In clear contrast, the substantial amount which the jury here awarded, $70,000, cannot, by any stretch of the imagination, be considered to be a token verdict similar to the $625 for loss of an eye in Schuerholz v. Roach. There can be no question that the jury, in this case, found that the plaintiff had been substantially damaged and should be substantially compensated. They simply did not understand that the amount of damages was undisputed; certainly they were told the contrary by defendant. If defendant had conceded in its summation what it later conceded in order to support its motion for a new trial, the question of the amount of damages should have been taken from the jury.

In the other case cited by the district court, National Fire Insurance Co. of Hartford v. Great Lakes Warehouse Corp., 261 F.2d 35 (7th Cir. 1958), the jury awarded exactly one-half the undisputed damages, whose computation had been shown them on a blackboard, and had been specifically explained by the trial judge. There was no way in which they could have assumed that they were free to award any amount less than the undisputed total, and the precise halving of that amount properly supported the inference that the jury had thus resolved their doubts about liability.

Here, however, the jurors were given written instructions to decide at least one of the questions on liability unanimously in plaintiff's favor before they could consider the amount of damages to be awarded. When the jurors thus came to the question of damages, moreover, they believed that they were authorized by the court to find any amount of damages so long as it was less than the stated amount. There is in that sequence absolutely no basis for an inference that the lesser amount which the jury found points to any compromise on the question of liability. It points only to the jury's conscientious adherence to the instructions which it had been given and its use of its best judgment of what it should award as damages, without having adequate understanding of how the damages were to be found.

At most, therefore, a new trial as to damages alone should have been ordered, as in Young v. International Paper Co., 322 F.2d 820 (4th Cir. 1963). There the Court of Appeals affirmed the grant of a new trial on damages alone, where the jury's award of $25,000 for destruction of plaintiff's timberland was less than the valuations which had been put in evidence by both parties. Defendant argued that the jury had been unable to conclude the issue of liability in plaintiff's favor and reached a compromise, while plaintiff suggested that the jury might have mistakenly called on an inapplicable $5.00 per acre figure, which applied only to a small portion of the land, and explained but did not justify the verdict. The

Court of Appeals, noting the "competing inferences" which were advanced by the parties, rejected "the surmise that the amount of this verdict was the product of a compromise to resolve doubt as to liability." 322 F.2d, at 823.

It is particularly significant that the Court of Appeals for the Fourth Circuit, in the Young case, specifically said that its own prior decision in Schuerholz v. Roach, supra, did not require an inference of a compromise verdict merely because the award of damages was inadequate. 322 F.2d, at 823. Similarly, the Fourth Circuit refused to apply Schuerholz v. Roach in another case where the jury had awarded approximately one-half the amount sued for, and the defendant claimed that a compromise verdict was reached, City of Richmond v. Atlantic Co., 273 F.2d 902, 916-917 (4th Cir. 1960).

The Fourth Circuit held in that case that the jury's answering of specific questions about causation, negligence, and contributory negligence before the question of damages was reached, supported the conclusion that the verdict was the result of the jury's honest judgment. If there was any doubt as to the honesty of the answers, the court suggested, a poll of the jury could have been requested when the answers and verdict were returned.*

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* In the instant case, the court similarly submitted special verdict questions to the jury which the jury was required to answer before the issue of damages was reached. Moreover, the jury here was polled at the request of the defendant, and

Footnote continued/

In its most recent opinion on the subject of alleged compromise verdicts, Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 511 F.2d 839 (4th Cir. 1975), the Fourth Circuit has put in complete perspective its early decision in Schuerholz and emphasized that it is a rare case in which the conclusion of an improper compromise is permissible:

> "This court has noted that there is always a presumption in favor of the validity of a verdict if it is the result of honest judgment. City of Richmond v. Atlantic Co., 273 F.2d 902, 916 (4th Cir. 1960), but has found a new trial on all issues to be required where a totally inadequate verdict was rendered which could only have been a sympathy or compromise verdict. Southern Railway v.Madden, 235 F.2d 198 (4th Cir. 1956) cert. den., 352 U.S. 953, 77 S.Ct.328, 1 L.Ed.2d 244 (1956). But where there is no substantial indication that the liability and damage issues are inextricably interwoven, or that the first jury verdict was the result of a compromise of the liability and damage questions, a second trial limited to damages is entirely proper. Young v. International Paper Co., supra; Mason v. Mathiasen Tanker Industries, Inc., 298 F.2d 28 (4th Cir. 1962)." (511 F.2d, at 846; emphasis added.)

Similarly, in Indamer Corp. v. Crandon, 217 F.2d 391 (5th Cir. 1954), where the jury awarded only $10,000 for damage to an airplane valued at from $37,000 to $50,000, the Court

Footnote continued/

unanimously assented to the answers in the completed special verdict (A-1004-1005). See Norfolk Southern R. Co. v. Ferebee, 238 U.S. 269 (1915), where the Supreme Court affirmed the grant by a state court of a new trial on damages in a case where the use of a special verdict which found defendant negligent showed the issues of liability and damages were separable. In Schottka v. American Export Isbrandtsen Lines, Inc., 311 F. Supp. 77 (S.D.N.Y. 1969), too, where the jury's special findings as to liability were separable from the jury's erroneous award of damages, a new trial was ordered solely as to damages.

of Appeals ordered a new trial as to damages alone. It determined that the jury's inadequate damages award was an obvious result of defense counsel's prejudicial mention that plaintiff had already received $50,000 for the plane under an insurance policy, despite the court's instruction that they were to disregard the insurance issue. Here, as in Indamer, the jury's finding as to liability is not called into question by the jury's failure to compute damages properly, where the defendant itself actively misled the jury in its computation.

The cases, moreover, make it clear that even if defendant were not in any way at fault for the improper award of damages, the finding of liability (even in cases where that finding is not a special and separate verdict) will not be set aside, either where there is a mere assumption that it was the result of a compromise, or where there are competing inferences as to the cause of the inadequate verdict. In Brown v. Richard H. Wachholz, Inc., 467 F.2d 18 (10th Cir. 1972), for example, the Court of Appeals reversed the trial court's denial of plaintiff's motion for a new trial on the ground of inadequate damages, after the jury awarded plaintiff just $1,705 for serious injuries suffered in a fall outside defendant's business premises.

In the Wachholz case, the jury's award for the exact amount of plaintiff's out-of-pocket expenses did not compensate plaintiff for pain and suffering and permanent partial disability. The court held that the damages and liability issues

in the case were distinct and "not in any way intermingled", 467 F.2d, at 21, and directed a new trial on the issue of damages alone, saying "there is no reason apparent for retrying the case on the issue of liability" (Id.).

In Darbow v. McDade, 225 F.2d 610 (3d Cir. 1968), too, the Court of Appeals affirmed the district court's grant of a new trial on damages alone, where a jury verdict for plaintiff in a motor vehicle accident awarded the precise amount of medical expenses, but included nothing for pain and suffering. See, also, the following cases where a new trial was ordered as to damages alone: Devine v. Patteson, 242 F.2d 828 (6th Cir. 1957), cert. denied, 355 U.S. 821 (1957) (award of only $500 compensatory damages in an action for malicious prosecution, although plaintiff's actual expenses were proved to be over $19,000); Yates v. Dann, 11 F.R.D. 386 (D. Del. 1951) (no award for pain and suffering despite court's instruction that jury had to make such award if it found for plaintiff); Martin v. Payton, 20 F.R.D. 200, 203 (W.D. Ky. 1957) (minimal award for pain and suffering; "No one but the jurors know just how they arrived at the verdict and to say that it was a compromise solely because it does not follow the court's instructions is to place an inference upon an inference which gives no sound basis for the conclusion"); Gardner v. Vogel, 237 F. Supp. 119 (E.D. Pa. 1964) (award in auto accident negligence case "patently inadequate").

The district court committed clear error in setting aside the verdict as to liability. While a new trial on damages alone would ordinarily have been the appropriate remedy, Industrial's post-trial sworn admission that the amount of damages was "undisputed" and "liquidated" makes any new trial unnecessary. Judgment n.o.v. for $161,895.75 is here the appropriate remedy,* since, this is "a case where there is no valid dispute as to the amount of damages". Decato v. Travelers Insurance Company, 379 F.2d 796 (1st Cir. 1967); 6A Moore's Federal Practice ¶ 59.05[3], p. 59-62 (2d ed. 1974).

Clearly, as established by Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), the court may order a new trial on damages, but as Professor Moore says, "It would be a mere formality to order a partial new trial limited to the issue of damages when the court could immediately thereafter grant summary judgment for the undisputed amount." 6A Moore's Federal Practice, ¶ 59.04[4], p. 59-72 (2d ed. 1974). Judgment for the undisputed amount of $161,895.75, therefore, plus interest from the date of payment by Ajax, May 20, 1968 [CPLR 5001(a), Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973)], should be entered, after the verdict on liability in the first trial is reinstated.

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* Plaintiff moved for a directed verdict at the close of all the evidence (A-898) and moved for judgment n.o.v. after the verdict (A-93-94).

II

The District Court's Submission of the Case to the Second Jury Erroneously Removed from the Jury 99% of the Plaintiff's Claims.

A. The District Court Erroneously Dismissed Ajax's Negligence Claim Before Submission of the Case to the Jury.

Judge Levet's response to the clear, and virtually undisputed evidence at the first trial of Industrial's negligence, and to the jury's unanimous finding of negligence which he set aside, was to remove the separate claim of negligence from the jury at the second trial.

Acting on his view that "the question of negligence is completely merged in the alleged breach of contract" (A-1755), which was foreshadowed by the proposed special verdict submitted to the parties in July (to which plaintiff objected in writing, A-146-160), the judge dismissed Ajax's negligence claim at the close of plaintiff's case.* In taking the separate issue of negligence from the jury, the district court improperly limited the jury's consideration to Industrial's negligence in the performance of a specific

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* Industrial moved at the close of Ajax's case for dismissal of Ajax's negligence claim only on the ground of insufficient evidence (A-1707-1708). In dismissing the claim, however, the court did not rely on that ground (A-1754), but ruled that "The complaint insofar as it alleges negligence separately is dismissed since negligence is entirely incorporated in the question of the fulfillment of the contract itself" (A-1755). The negligence claim stated in the complaint, however, clearly asserted negligence in the performance of the appraisal, independently of the claim of breach of contract (A-11-12).

contract;* it ruled out any consideration of Ajax's broader claim that, regardless of the terms of any contract for an appraisal, regardless even of whether there was any appraisal contract at all, Industrial was negligent in preparing the appraisal which it delivered to Ajax.

Ajax's negligence claim was never narrowly limited simply to one means by which a specific contract was breached, but was asserted as a separate and independent claim for relief.** Since the pleading of alternate, and even inconsistent, claims is specifically allowed under Rule 8(e)(2) of the Federal Rules of Civil Procedure, Ajax was entitled on that ground alone to have each of its theories, supported by substantial evidence, presented to the jury, Breeding v. Massay, 378 F.2d 171, 178 (8th Cir. 1967); Twentieth Century-Fox Film Corp. v. National Publishers, Inc., 294 F.Supp. 10, 12 (S.D.N.Y. 1968), if only because the jury

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* Negligence in the performance of the improperly limited contract defined in Question 1 had, however, been removed as a subordinate question from the special verdict form (see p. 27, above) and was mentioned only in the district court's charge (A-1917-1919).

** The Pre-Trial Order listed as one of the agreed-upon issues for trial, "Was the defendant negligent in the performance of its services as plaintiff's appraiser? (emphasis added), not in the performance of the specific agreement referred to in other questions (A-26). Ajax repeatedly stated its objection to the district court's failure to present negligence as a separate question for the jury (A-156, 1037, 1737-1740, 1758-1759, 1843).

may find one theory easier to understand than another.* See, e.g., Powell v. E.W. Bliss Co., 346 F.Supp. 819, 825 (W.D. Mich. 1972), where the trial court denied defendant's motion to set aside the jury's verdict that it was negligent, on the ground that the verdict was inconsistent with the finding there was no breach of implied warranty. That court said, "Some or all of the jurors may very well have abandoned consideration of implied warranty simply because of a reluctance to cope with the complexity of that theory...."**

Whether or not Ajax could prove a meeting of the minds on a specific contract for Industrial's services, - in the Procrustean terms against which the district court had the jury measure Ajax's case, or in other terms - the proof was incontestable that Industrial did deliver an appraisal report to Ajax, with the expectation that Ajax would rely on that appraisal. It was therefore liable for any negligence in providing that report. A jury might indeed find that there was no contract at all, and Industrial therefore would not be liable for breach of contract for failing to deliver an appraisal. But Industrial did deliver what

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* In products liability cases, for example, it is common for plaintiffs to present a variety of negligence and contract theories of recovery to the jury. See Victorson v. Bock Laundry Machine Co., 37 N.Y.2d 395, 373 N.Y.S.2d 39, 41 (1975); and a plaintiff cannot be forced to elect among his remedies. Cooley v. Salopian Industries, Ltd., 383 F.Supp. 1114, 1116 (D.S.C. 1974).

** Just so here, the first jury apparently abandoned consideration of breach of contract after the district court's reluctant and cryptic response to its request for further instructions. (See p. 34, above).

purported to be a professional appraisal. And even if it did so voluntarily - of course, it got a $4400 fee - Industrial would be liable for failure to exercise due care.

This fundamental principle of tort law is well summarized by Professor Prosser:

> "Where a physician has contracted to treat a family for a year, and refuses to attend when sent for, the cause of action has been held to be for breach of contract only, since the law recognizes no obligation upon a doctor to come when he is called for, in the absence of such a promise. But if he does attend, and renders his services negligently, he is liable in tort, even in the absence of a contract, because he is regarded as having assumed the duty, and he is required by law to exercise proper care as to every one whom he treats, even though he does so gratuitously." (emphasis added)

W. Prosser, The Law of Torts §93, at p. 634 (3d ed. 1964); see, also, §54.

The district court did not rule that there was insufficient evidence to support the negligence claim. In fact, that evidence was overwhelming* (A-1089, 1094-1095, 1235, 1384-1385, 1392-1395, 1403-1407, 1409-1417, 1420, 1493, 1498, 1504, 1507, 1510, 1518-1519, 1524-1530, 1533, 1536-1546, 1552, 1556-1557, 1577, 1594, 1618-1620, 1625-1627, 1637, 1657-1659, 1669-1674, 1679-1680; PX 29, ¶¶ 3.1, 6.4, 8.2, 8.3, E-137-138, 142-143, 150-151).

On the record, it is incontestable that Industrial simply never performed a professional appraisal of the Time machinery, for any purpose, and that if it had, Ajax would

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* See pp. 13-17, above. Essentially, the same evidence was repeated in the second trial at the pages listed above in parentheses.

have been alerted that the machinery was not good collateral for a loan of $270,000. Yet, by dismissing Ajax's claim for negligence before submitting the case to the jury, the district court deprived Ajax of any possibility of recovery for Industrial's cavalier disregard of any professional standards in the preparation of its appraisal which it delivered to Ajax for a fee of some $4400.

B. Ajax's Fraud Claim was Erroneously Dismissed Before Submission of the Case to the Jury.

At the same time that he dismissed Ajax's basic cause of action, the district judge also dismissed the fraud claim on the ground that it had not been proved by "clear and convincing" evidence (A-1755-1756). On essentially the same evidence, the same judge had permitted that claim to go to the jury in the first trial; he should have done the same at the second trial.

Defendant made three major representations in its appraisal report; they were all incontestably false. Industrial reported to Ajax (1) that machinery such as that in the Time plant was not available to American manufacturers unless they were members of the Swiss trust and, even then, delivery might take two or three years; (2) that no other plant in the United States was equipped with such machinery; and (3) that American manufacturers would pay premiums over the values stated in the appraisal if such machinery were made available to them (PX 5, E-96-97).

Those statements could be expected to, and did, persuade plaintiff that the Time machinery was in great demand, eagerly sought-for, and, therefore, of great value, even in excess of the values given in the appraisal. Moreover, the entire appraisal report was a misrepresentation, since it purported to be based on Mr. Thaler's expert, independent professional judgment, and failed to reveal that it was in fact based on another "appraisal" made for a different purpose by Martin Kaefer who, by his own frank admission, was not a professional appraiser (A-1627).

All the elements of fraud are therefore present:

(1) a false representation by defendant or concealment by defendant of information;

(2) defendant's knowledge that the representation was false, or the absence of reasonable grounds for defendant to believe it to be true;

(3) defendant's intention to induce plaintiff to act or to refrain from acting on the basis of its representation;

(4) plaintiff's justifiable reliance on the representation; and

(5) damages suffered by plaintiff as a result of such reliance.

See W. Prosser, The Law of Torts, §§ 100, 103, 104 (3d ed. 1964) Ultramares v. Touche, 255 N.Y. 170 (1931); Potter's Photographic Applications Co. v. Ealing Corp., 292 F.Supp. 92, 106 (E.D.N.Y. 1968); First National Bank of Hempstead v. Level Club, 241 App. Div. 433 (1st Dept. 1934).

The falsity of the specific representations of fact made in Industrial's appraisal was not disputed (see p. 16 above).

Moreover, Mr. Thaler himself admitted that he made no inquiry at all about the availability of machinery like that in the Time plant, the Swiss Watch Trust, or whether manufacturers would pay premiums over and above the appraised values (A-1524-1528). Nor did he make any of the fundamental inquiries ordinarily made by a professional appraiser of machinery, such as would elicit information about economic obsolescence in the industry or about market demand (A-1509-1510, 1518-1519).

While he claimed to have relied on the values established by the Hirschmann "appraisal" in 1964, Mr. Thaler admitted that he was not familiar with the Hirschmann company at the time of the appraisal (A-1550-1551); and he certainly did not know Martin Kaefer, whom he sought out three years later to ask how he had conducted his "appraisal" (A-1627-1628, 1630-1633). Nor did he know that Mr. Kaefer was not a professional appraiser. The evidence, therefore, was not only "clear and convincing", it was uncontested, that Industrial's representations were made without any reasonable basis to believe they were true.

The proof that Industrial intended to induce Ajax to act or to refrain from acting on the basis of its representations is in the testimony of Mr. Thaler himself that he knew that Ajax was waiting for his appraisal and was going to rely on it (A-1529-1530). From the evidence here, the jury could have found an "intention to deceive" from proof

that Industrial knowingly made false representations with knowledge that Ajax would act in reliance thereon, or that Industrial made statements as true to its own knowledge, when it lacked reasonable grounds to believe the statements to be true, with intent that Ajax would act on those statements. See, e.g., Ultramares v. Touche, 255 N.Y. 170, 179, 190-193 (1931); W. Prosser, The Law of Torts § 102 (3d ed. 1964).

Ajax's justifiable reliance on Industrial's appraisal with its false representations was shown not only by Thaler's statement that he knew Ajax was going to rely on the appraisal, but by Industrial s letter to Ajax of August 30, 1966, assuring Ajax of the "authenticity and reliability of our appraisal figures" and stating that the appraisal "is a sound and scientific evaluation of the assets in question" (PX 10, E-118) and by Mr. Kriser's oral assurances given to Mr. Klein on August 30 (A-1124-1127, 1352-1353). There was no dispute that, following that letter, Ajax guaranteed a loan of $270,000 to Time (A-1127, 1353-1354) and subsequently was damaged by the amount it had to pay the Bank when Time defaulted on the loan and the machinery pledged as collateral was sold. The proof as to Industrial's fraud, most of which comes directly from the testimony of Mr. Thaler himself, is so plain that Ajax was entitled to have this issue determined by the jury.

C. The Special Verdict Form Given to the Jury Excluded from the Jury's Consideration Plaintiff's Basic Contract Claim.

By dismissing Ajax's negligence and fraud claims before

submission of the case to the jury, the district court denied plaintiff due process of law; plaintiff was entitled to have each of its claims and alternate theories of recovery, supported by substantial evidence at the trial, fairly submitted to the jury. National Bank of Commerce v. Royal Exchange Assurance of America, Inc., 455 F.2d 892 (6th Cir. 1972); Kornicki v. Calmar Steamship Co., 460 F.2d 1134, 1139 (3d Cir. 1972); R.H. Baker & Co. v. Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir 1964); Angelina Casualty Co. v. Bluitt, 235 F.2d 764, 767, 770 (5th Cir. 1956).

The court left only plaintiff's claim for breach of contract, and, even as to that claim, it framed the issue for the jury so as to permit recovery only if the jury found a contract with particular terms of almost microscopic precision; it ignored plaintiff's basic claim that the contract was for the performance of an appraisal of the value of machinery as collateral for an anticipated loan. The questions asked in the special verdict form, moreover, prevented any finding by the jury that even if the contract were, as defendant claimed, one for the appraisal of the fair market value of the Time plant, as a manufacturing plant, that contract had been breached by negligent performance.

By making a "Yes" answer to the first special verdict question a necessary prerequisite to any finding in Ajax's favor, and by ignoring Ajax's essential contract claim in formulating that question, the district court effectively

took most of Ajax's remaining case away from the jury before its deliberations began, just as it had removed negligence and fraud.

(1) Industrial agreed to appraise the value of the Time machinery as collateral for a loan.

Ajax's fundamental contract claim was that Industrial was told that an appraisal of the Time machinery was needed to determine if the machinery would have sufficient value as collateral for a loan of approximately $250,000, and that Industrial agreed to perform an appraisal suitable for that stated purpose.* The first question, as framed by the district court, precluded the jury from considering that claim.

Ajax's evidence did support a claim that Ajax asked for, and Industrial agreed to perform, an appraisal of the "forced sale" value of the "individual items of machinery and equipment" at the Time plant, as Question 1 asked. But that was not the only theory of contract which was supported by the evidence, and which would entitle Ajax

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* Ajax objected to the special verdict question as framed by the court and, in accordance with its contention in the Complaint (A-7-8) and the Pre-Trial Order (A-16-17) proposed that the first question should ask whether Industrial:

> "entered into a contract to appraise the machinery and equipment at the Time & Micro plant to determine whether the Time & Micro machinery and equipment would have sufficient value as collateral to assure Ajax protection on the loan or guarantee of a loan of approximately $250,000." (A-1840-1841)

(See, also, A-1740, A-155).

to a finding of defendant's liability even if the jury should answer "No" to the court's Question 1.

Mr. Klein testified that:

> "I told Mr. Thaler that Ajax was interested in retaining its services to perform an appraisal at the Time & Micro plant. I told him the purpose that Ajax wanted the appraisal for was that they were contemplating either advancing money or guaranteeing a loan for Time & Micro and that we wanted to know the forced liquidation value of equipment in case there was a default on the loan and the equipment had to be sold. (A-1084, emphasis added; see, also, A-1222-1224).

Mr. Thaler acknowledged that Mr. Klein told him on August 12 that Ajax wanted the appraisal "in connection with some financing which would involve the machinery as collateral" (A-1495).

On that testimony, certainly, the jury could have found that Industrial agreed to provide an appraisal of the value of the machinery as collateral for a loan. Such a contract, as the evidence showed, was breached in one of two ways: (a) Industrial did not provide a suitable appraisal for collateral purposes; or (b) Industrial undertook to provide a value for collateral purposes, but did not perform a proper independent professional appraisal.

(a) In the face of concurrence in the testimony of both Klein and Thaler that the appraisal was to be supplied in connection with the use of the Time machinery as collateral, Industrial claimed to have supplied only a "fair market value in-place" appraisal of the Time plant, giving its value as an

operating business (A-20-21, 1536, 1597, 1604), and denied that it placed any "liquidation" value on the Time machinery (A-1586).

The undisputed testimony of Mr. Sinclair was that an appraisal for collateral value purposes as security for a loan would, under the standards of the profession, provide a liqidation value (A-1385), not "fair market value in-place". It was also undisputed that it was Industrial's obligation, as a professional appraiser, to select the appropriate appraisal value for Ajax's purpose (PX 29, § 3.1, E-137; A-1384, 1414) and to define adequately in its appraisal report the value which it supplied (PX 29, §§ 3.1, 6.1, 8.2, E-137-138, 141-142, 150-151; A-1413).

For Industrial, therefore, to supply only an "in-place" fair market value appraisal of the Time plant, after being told that Ajax needed to know whether the machinery would provide adequate security as collateral for a loan* was to fail to supply the correct type of appraisal value, and thus a breach of contract. Its simultaneous failure to define in its appraisal the type of value it claims to have supplied was itself an additional breach of contract and compounded the primary breach in supplying the wrong type of value. Any possible "misunderstanding or misapplication" (PX 29, § 3.1,

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* In addition to Mr. Thaler's explicit statement that he knew Ajax wanted the appraisal "in connection with some financing which would involve the machinery as collateral' (A-1495), Thaler also testified that Mr. Klein told him that Ajax was going to use the appraisal "to conduct whatever else he had to conduct after he received this appraisal . . . which I presumed was in connection with making a loan." (A-1598, emphasis added).

E-137) of the appraisal by Ajax was Industrial's responsibility because of its failure to define the value it supplied (A-1403 1404, 1406, 1413). The district court's Question 1 prevented any consideration by the jury of those breaches of that contract.

(b) There was ample evidence to support a finding that Industrial actually undertook to give Ajax an evaluation of what the machinery was worth as collateral, but did so in a negligent manner, and without making an independent professional appraisal of that value. (See pp. 13-17, above). Mr. Klein testified that Mr. Thaler gave him a forced liquidation value of approximately $500,000 on August 16 (A-1098). This value was confirmed by representations as to scarcity and demand for the machinery, in the formal appraisal letter of August 19 (PX 5, E-96-97), as well as by Industrial's statement that "it is inconceivable that the value would be less than 60% of the appraised figures that we have established", referring to "the market values of used machinery for the next 2 years"* (PX 5, E-97; emphasis added). Klein further testified that he was reassured as to reliance on the values given in the appraisal, for collateral purposes, by Mr. Kriser on August 30, and told that Industrial had performed appraisals for collateral purposes in the past (A-1124-1126, 1352-1353).

Thus, under either of two simple theories, both supported by substantial, indeed essentially uncontradicted,

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* Mr. Kaefer testified that the value of the Time machinery as used machinery in 1964 would have been approximately $200,000 (A-1626-1627).

evidence, the jury could have found breach of contract even if it answered "No" to Question 1, if it had been permitted to find, in accordance with the evidence, that Industrial agreed to appraise the value of the Time machinery as collateral for a loan.

(2) Negligent performance of an agreed "in-place" appraisal would have been a breach of contract.

A third breach of contract finding could have been made on the evidence if the jury had been permitted to find that Ajax requested and Industrial supplied only an "in-place" fair market value appraisal. Ajax would still be entitled to recover for Industrial's breach of contract in failing to perform that type of appraisal in accordance with normal professional standards.

Ajax proved by virtually uncontradicted evidence that a proper appraisal, made according to professional standards, would have shown that there was "no market" for the Time plant, in-place or otherwise, and that watch manufacturing machinery in the United States in August, 1966 had only minimal value under any conditions of sale. (A-1657-1659, 1672-1673, 1618-1620, 1625-1626, 1637, 1651, 1678-1680) Mr. Sinclair testified that an appraiser of machinery must examine the economic conditions of the industry and determine the market for the machinery being appraised (A-1393-1395, 1407, 1412). Mr. Thaler, Industrial's appraiser, admitted that he made no inquiry into the market for any of the Time machinery (A-1556-1557, 1543-1545, 1552, 1540-1541,

1509-1510); he merely assumed the machinery was in great demand.*

If Industrial, therefore, had professionally appraised even the "in-place" value of the Time machinery - the highest value which machinery can have (A-1468) - and conveyed that information to Ajax, Ajax would have been told that it had little or no value. Defendant argued that plaintiff had no right to rely on in-place value in determining the value of machinery as collateral, but if Ajax had known that the in-place value was minimal because there was no market for such a plant, it would have been compelled to conclude, a fortiori, that its value as single pieces of used machinery was even less. No reasonable man could have concluded that Ajax would nevertheless have obligated itself to guarantee a loan in the amount of $270,000, with the machinery as collateral. The jury, however, was not permitted to determine whether Industrial had breached even the contract which

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* Thaler claimed nevertheless that "the market demand for precision machines was good at the time" of his appraisal (A-1544), and that "in principle there was a great demand for machinery and there was no change or depreciation in values since the appraisal made by Mr. Hirschmann [sic; in reality, Mr. Kaefer, who Mr. Thaler did not know and who was not an appraiser]" (A-1537); he said that he knew from other auction or liquidation sales that Industrial had conducted that "we had a great response to all of our sales by buyers who were willing to pay top prices for machine[ry]." (A-1538).

It is ironic that appellant believes itself forced to write so lengthy a brief on appeal to demonstrate that the court below removed the essential issues from the jury when defendant's appraiser admits so casually that he regarded all "machinery" apparently as fungible, not distinguishing in his appraisal activities between highly specialized premium watch-making machinery in a dying industry; other specialized machinery as, for example, for manufacturing Edsel automobiles, and just "machinery" for which buyers were willing to pay "top prices".

it claimed it had made, by its grossly negligent preparation and delivery of an in-place appraisal.

In this case, as in National Bank of Commerce v. Royal Exchange Assurance of America, Inc., 455 F.2d 892 (6th Cir. 1972), the special verdict Question 1* improperly foreclosed jury consideration of alternate theories of recovery, even under plaintiff's contract claim. Having removed perhaps 70% of plaintiff's case by dismissing the negligence, fraud and punitive damage claims before submission to the jury, the district court then, by the way it phrased Question 1, emasculated the remaining contract claim, leaving perhaps 1% of plaintiff's case as set forth in the pre-trial order.

D. Consideration of Even the Miniscule Part of the Contract Claim Which the District Court Allowed the Jury to Determine Was Tainted by Prejudicial Admission of Irrelevant Evidence, Prejudicial Statements by Industrial's Counsel, and Prejudicial Comment by the Court.

(1) The district court prejudicially admitted irrelevant evidence of payment to plaintiff on another claim and permitted prejudicial comment by defendant's counsel.

Despite Industrial's admission following the first trial that damages in this case were "liquidated" and

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* Question 1 was also improper, and objected to (A-155, 1841-1842), because it required the jury to find all the elements of the oral contract postulated by the district court before it could answer "Yes". In other words, the jury had to find that Industrial agreed to appraise the forced liquidation sale value of each individual item of machinery and equipment. Even if the jury was persuaded, therefore, that Industrial agreed to give the total forced liquidation sale value of the machinery and equipment, it was required by the district court's question to answer "No" and render a verdict against Ajax.

"undisputed", the district court allowed defendant to inject into the second trial the irrelevant and highly prejudicial fact that Ajax had received a total of some $249,000 from the United States Government, for itself and subcontractors, in settlement of claims arising out of termination of a contract to manufacture fuses.* After admitting into evidence full documentaton of Ajax's termination claim and the settlement sum it received from the Government,** the district court eventually ruled that the evidence was admissible only to show a possible mitigation of damages of up to $20,000, the amount which the Government paid on Ajax's claim on behalf of Time*** (A-1778-1779).

The jury was never instructed to disregard all the other evidence about Ajax's contract termination claim and

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* On the very opening day of the second trial, the court allowed Industrial to add the vague defense of "mitigation of damages" even though, as Ajax showed in opposition to the motion, Industrial had not offered any explanation of the alleged "mitigation" apart from its counsel's "belief" that Ajax claimed and received compensation for the loan guarantee loss. That belief had been proved completely fanciful by the documents and factual admissions, which Ajax had supplied on Industrial's motion (A-242-243, 1030-1032, 1041-1043, 1045-1049). The court nevertheless permitted a defense to be added to the answer which was patently without merit, and then refused to prevent Industrial's counsel from referring to the Government's payments to Ajax in his opening statement (A-1047-1050).

** Plaintiff had demonstrated, without contradiction, before the trial began, on a motion for a protective order, that those documents had nothing to do with plaintiff's claim in this action to recover on its guarantee loss (A-178-183).

*** Defendant did not show by any evidence that Ajax had received or kept that $20,000 or that it was or should have been applied in mitigation of its loss on its guarantee of the Time loan.

payment which had nothing to do with this case (A-1177-1179, 1824-1825, 1941). Defendant, moreover, repeatedly made improper and prejudicial remarks to the jury concerning Ajax's claim and the Government payment, even after the court had ruled that the evidence could be considered only for possible mitigation to the extent of $20,000, and directed defendant to refrain from suggesting to the jury that they could consider the entire sum (A-1851). The prejudice created by the improper admission of such evidence, and defendant's improper remarks, permeated the proceedings and alone necessitates reversal of the jury's finding.

In a highly-charged opening statement, defendant focused on the $249,000 paid to Ajax claiming repeatedly that what Ajax did was "to rip off the United States government". (A-1068, 1076-1077). In a ringing peroration, defendant told the jury:

> "I said that is a rip off and I mean it. I say this approaches criminal fraud, and I mean it." (A-1077).

Immediately afterwards the court flatly refused to instruct the jury to disregard these improper statements (A-1078-1079).

The following morning, however, the district judge told the jury that he had not realized the significance of "a certain remark [by Mr. Stream] about the actions of the plaintiff in connection with the receipt of monies from the Government upon termination of the Government's contract for fuses," and stated:

"There is no criminal charge here against the plaintiff with respect to that phase of the case, and you may therefore disregard the statement as made to any such effect...." (A-1135-1136)

In some respects, the court's statement coming as it did the next morning, and referring only to the fact that there was no criminal charge, only made matters worse: the court called attention to the monies which Ajax had received from the Government without at the same time cautioning about its irrelevance.

From the beginning of the second trial, thus, defendant, without check by the court, irrevocably and prejudicially made Ajax's irrelevant receipt of $249,000 into a cloud over Ajax's entire case.* All of the documents showing the

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* In its opening statement, defendant said:

"The contract of Uncle Sam was signed on October 19th. On December 30th the government terminated the contract. We don't know why but we are going to find out why. We will find out that all this hue and cry about losses is a whole other thing. You will find in the evidence before you that Uncle Same[sic] on the claims of this plaintiff, paid to this plaintiff $249,917 as damages because the government liquidated or the government prematurely terminated the contract, $249,000 in damages, less than ninety days after they were engaged in the first place.

"You have to find out what they did with that money. How much did they keep. Did they really have any loss, even if they were one hundred percent right with all their causes of action, were they really out of pocket or did they rip off Uncle Sam the way they did Ajax? [sic]

"You are going to have to ask yourself why did did [sic] they not protect Time &

Footnote continued/

Government's payment to Ajax of $249,000 were admitted in evidence and kept before the jury although the district court eventually limited the defense of "mitigation" to $20,000 without any evidence that $20,000 was, or should have been, applied in mitigation of plaintiff's guarantee loss (A-1778-1779). This exercise in jury confusion ended as it had begun, with defendant haranguing the jury about the $249,000 which plaintiff had received from the Government although the court had finally instructed defendant not to refer to that payment in its summation (A-1851).*

Footnote continued/

> Micro? Why did they let that company go down the drain at a public auction? Those are questions we will get at at summation at the conclusion.
>
> "Be mindful of them, they are important." (A-1076; emphasis added)

* The pertinent excerpt from defendant's closing statement, directing the jury's "particular attention to page 3 of Exhibit I" (showing total payment of $249,917, E-204), and admonishing "ask yourself what happened to the $249,000" (A-1892-1893), follows:

> "So what happened in 1968? We will never know, I dare say, since it doesn't come out so far why the government terminated the contract. You may have some ideas as to it but there is nothing in the record that shows why the government so abruptly changed its mind less than two months after it approved the contract leading to a filing of a claim of $390,000. Even Ajax or Industrial Plants, [sic] it's own captive subcontractor didn't get a bid from Industrial Plants [sic] for December 11th. By telegram they engaged them as a sub and yet Ajax says it spent $399,000 and all it got back was $249,000. It got $249,000, that it got back.

Footnote continued/

The introduction of evidence showing payments to Ajax (DX B, G, I, E-189-205; A-1169-1173, 1177-1179, 1320, 1324-1325, 1824-1825), subsequently ruled not relevant by the court, and the keeping of that evidence before the jury by the

Footnote continued/

"MR. BRILL: I must object to this.

"THE COURT: The jury will determine the facts if they are not what the lawyer states, counsel.

"MR. STREAM: I suggest the jury bear in mind Exhibit I in evidence. Exhibit I in evidence which is the termination settlement contract between Ajax and the United States Government. Pay particular attention to page 3 thereof.

"On damages. I ask you to consider why in a case as important as this was to the plaintiff in 1966 its complaint was barren as we demonstrated of any reference to the United States Government.

"THE COURT: Speak up a little more.

"MR. STREAM: Is barren of any reference to the United States Government. Why it took eliciting by me in cross examination to bring out that Ajax had gotten a United States contract for $3,000,000, why you had to draw out by admission of fact that Ajax had been terminated and it received $249,000 and you go into the jury room and ask yourself what happened to the $249,000.

"MR. BRILL: I must object strenuously to statements of counsel directly in opposition to the prerogatives [sic] and instructions in chambers this morning as to that sum of money and I request that the Court direct Mr. Stream --

"THE COURT: You may disregard that last statement."

"MR. BRILL: I apologize for interrupting but I was forced to." (A-1892-1893, emphasis added).

court, and by defendant, plainly prejudiced Ajax's case and require reversal. San Antonio v.Timko, 368 F.2d 983 (2d Cir. 1966). See Altenbaumer v. Lion Oil Co., 186 F.2d 35 (5th Cir. 1950), cert. denied, 341 U.S. 941 (1951) (verdict for defendant reversed because of improper evidence and comment that plaintiff was covered by workmen's compensation insurance); La Made v. Wilson, 512 F.2d 1348, 1350 (D.C. Cir. 1975) ("the admission of evidence concerning an injured party's receipt of collateral social insurance benefits constitutes reversible error, because it involves a substantial likelihood of prejudicial impact and the possibility of its misuse by the jury outweighs its probative value."); Rule 403, Federal Rules of Evidence.*

It may be said that the second jury never reached the question of damages, so the so-called "mitigation" evidence could not have been prejudicial to Ajax. The vice in the introduction of that evidence, however, was not that it might have confused the jury as to the amount of the damages, but that the Government payments on an entirely unrelated claim were irrelevant to this action. Yet they were permitted to be used to inflame the jury against plaintiff on the suggestion that plaintiff, having already "ripped off" $249,000 from the Government because of the termination of a fuse contract, was trying

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* It is significant that defendant never once referred to $20,000 in summation, as possible mitigation (as to which, see p. 65, footnote, above) but referred to the completely irrelevant payment of $249,000.

to get another $161,000 from defendant, although the $249,000 compensated plaintiff for any possible loss it could have suffered in connection with the fuse contract, with which the loan guarantee was also connected.

It is precisely because a jury may throw up its hands and decide against the claimant when it is presented with a mass of indigestible and unexplained evidence that irrelevant material should not be permitted in evidence, particularly when such irrelevant evidence may lead the jury to conclude that the plaintiff has already received "rough justice". There was absolutely no excuse for the district judge to receive the objectionable "mitigation" evidence or to permit defendant to use it to confuse the issues in this case.

(2) The district judge commented prejudicially to support the credibility of defendant's appraiser.

Because of the extremely limited contract claim which the district court permitted the jury to consider, the credibility of the witnesses for each side was of paramount importance at the second trial. Under the court's instructions, the jury could find in plaintiff's favor only if it answered "Yes" to the first question, which set out the court's version of the oral appraisal agreement made between Howard Klein and Jesse Thaler on August 12, 1966. The jury had to evaluate the testimony of those two men on the terms of the oral agreement they made. Obviously, if one of them could be shown not to have told the truth on a

relevant matter the jury would be much more likely to accept the testimony of the other.

The trial judge, however, intervened improperly to support the credibility of defendant's appraiser. That intrusion by the trial judge into the limited, but therefore all the more critical single question which was left for the jury to consider requires that the jury's verdict be set aside. Anderson v. Great Lake Dredge & Dock Co., 509 F.2d 1119, 1131-1132 (2d Cir. 1974); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973); Ah Lou Koa v. American Export Isbrandtsen Lines, Inc., 513 F.2d 261 (2d Cir. 1975).

For Ajax to recover under the special verdict questions posed by the court, the jury had to find that the oral appraisal agreement of August 12, 1966 called for Industrial to give Ajax the values which individual items of machinery would bring at a forced sale or liquidation sale. Howard Klein's testimony as to what he told Mr. Thaler supported such a finding by the jury (A-1084, 1268). Mr. Thaler, however, at one point in his deposition, testified that Klein asked only for an appraisal of the Time plant "in place and ready for operation, continued operation"* (A-1589),

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* This testimony was inherently incredible because the Time plant was not in operation and there was no intention for anyone to resume watch production, and because Thaler himself testified that he was told that the machinery was to be used as collateral for a loan. If Thaler could be persuasively shown to have told a deliberate falsehood on a relevant matter, no possibility of crediting his already dubious version of the oral agreement would have remained.

although at another point, he testified that he had been told that the appraisal was wanted in connection with a loan for which the machinery would be used as collateral (A-1495).

In Mr. Thaler's deposition which was read to the jury, however, he had also testified that he had never talked to Mr. Martin Kaefer, who had performed the "appraisal" of the Time plant for the Hirschmann Corporation in 1964 (A-1586-1587). Obviously, if the jury could be shown that Mr. Thaler had in fact specifically arranged to see Mr. Kaefer and attempted to find out the basis for Mr. Kaefer's assignment of values to the Time machinery, the truth of his other testimony, including the terms of the oral agreement, would be thrown into serious question. For why would Mr. Thaler try to find out how Mr. Kaefer had evaluated the machinery if he had indeed been told by Ajax that he could rely on those values? And why would he be interested in how Mr. Kaefer had evaluated the machines if he himself had made a professional evaluation of each of them?

Yet, as plaintiff was reading to the jury from Mr. Kaefer's deposition to prove that Mr. Thaler had not told the truth, the district judge interrupted to tell the jury that it had no significance. In that part of the Kaefer deposition which was being read, Kaefer testified that Mr. Thaler came to see him in 1968 or 1969,* and that Mr. Thaler had wanted to discuss the appraisal of the Time machinery

* This action was begun on May 5, 1969 (A-2) and for some time before that date Industrial was aware that Ajax intended to bring suit.

which Kaefer had made in 1964 (A-1627-1633). Judge Levet completely undercut the import of Mr. Kaefer's testimony by saying: "This is trivia, that is what it is."

The court's comment came just as plaintiff was about to finish the pertinent passage:

> "'Q. When you say that he wanted to get more "specifics", I think was your word, about the 1964 appraisal, exactly what was it that he asked you?
>
> 'A. That I can't tell you any more.'
>
> THE COURT: This is trivia, that is what it is.
>
> MR. BRILL: It's not trivia. It goes to the credibility of Mr. Thaler.
>
> THE COURT: This is merely my expression and I have a right to comment on it.
>
> MR. BRILL: I want to finish this last question and answer on this subject.
>
> THE COURT: Go ahead.
>
> MR. BRILL: [continuing to read answer interrupted by the court] 'It is my recollection that he said I am here to discuss this appraisal you did, sometime ago for some association. I said yes, I recall that and I was not about to volunteer too much information because, number one, I did it in behalf of a client, period.'
>
> 'Q. Mr. Shriro or Precision Time?
>
> 'A. Right, but I didn't pursue the matter further whether I have the client's permission to discuss it or anything else.'
>
> THE COURT: [interrupting again]* You have far enough of that. What else is there in this book?" (A-1632-163[illegible]

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* Compare the complete passage read at the first trial (A-880).

Earlier, the court had interrupted the reading of Mr. Kaefer's testimony about his conversation with Thaler to remark sarcastically, "Now we have learned a lot of things." (A-1632)

Ajax was entitled to go to the jury on the crucial issue of credibility without unreasonable disparagement of its proof of Thaler's untruthfulness by the trial judge.

Conclusion

The brief has demonstrated how the district judge by a succession of erroneous rulings nullified the fair determination of the issue of liability in the first trial, and prevented its fair consideration in the second trial. The record also shows his constant interference with the fair presentation of plaintiff's case. Space limitations prevent discussion of the latter aspect of the denial of due process to the plaintiff, but such discussion is not necessary to the success of this appeal.

The judgment of dismissal below should be reversed, the verdict of the first jury on liability reinstated and judgment n.o.v. entered for plaintiff in the sum of $161,895.75 plus interest. If the Court remands for a new trial on any issue, however, the unfairness by interference and hostility to

which we have only been able to refer, but which can be substantiated by reference to portions of the proceedings reproduced in the Joint Appendix, requires that the remand be to a different district judge.

Respectfully submitted,

POLETTI FREIDIN
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By _____
Murray Gartner
A Member of the Firm
Attorneys for Plaintiff-Appellant

Dated: New York, New York
May 24, 1976

Of Counsel: Edward Brill

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AJAX HARDWARE MANUFACTURING CORPORATION,

: Docket No. 75-7663

Plaintiff-Appellant,

: CERTIFICATE OF SERVICE

-against-

:

INDUSTRIAL PLANTS CORPORATION,

Defendant-Appellee. :

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I hereby certifiy that on May 24, 1976 on behalf of Plaintiff-Appellant Ajax Hardware Manufacturing Corporation, I caused two true copies of Appellant's brief and one copy of the joint appendix to be personally served upon Monasch Chazen & Stream, 733 Third Avenue, New York, New York.

Edward A. Brill

Edward A. Brill